United States Court of Appeals

for the Second Circuit

RESPONDENT'S BRIEF

74-2638

BRIEF FOR RESPONDENT FEDERAL POWER COMMISSION

IN THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Greene County Planning Board,
Petitioner,

v.

Federal Power Commission,
Respondent,

Power Authority of the State of New York,
Intervenor.

ON PETITION TO REVIEW ORDERS
OF THE FEDERAL POWER COMMISSION

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BRIEF FOR THE FEDERAL POWER COMMISSION

STATEMENT OF THE ISSUES

1. Whether the Commission properly concluded that the instant proceeding did not involve matters subject to Commission regulation under the Federal Power Act?

2. Whether this Court has jurisdiction to review the Commission's actions in this case under Section 313(b) of the Federal Power Act, given that the Commission did not act pursuant to the Federal Power Act in this proceeding?

3. Whether the Commission properly issued the Presidential Permit involved herein under the terms of Executive Order No. 10485?

a) Whether the Commission properly concluded that Section 7(d) of the Energy Supply and Environmental Coordination Act of 1974 exempted this proceeding from all of the requirements imposed by the National Environmental Policy Act of 1969?

b) Whether the Commission, in issuing the disputed Presidential Permit, properly complied with all provisions of Executive Order No. 10485?

REFERENCE TO RULINGS

Under review here are two unreported orders of the Federal Power Commission issued in Power Authority of the State of New York, Docket No. E-8414: "Order Granting Interventions And Denying Requests For Hearing And Consolidation" issued on September 13, 1974 (R. 130); and "Order Denying Petitions For Rehearing" issued on October 25, 1974 (R. 144). Also at issue here is a "Permit Authorizing Power Authority Of The State Of New York To Construct, Operate, Maintain And Connect Electric Transmission Facilities At The International Border Between The United States And Canada" issued September 13, 1974 (R. 136).

This case has not previously been before this Court.

STATEMENT OF THE CASE

The instant proceeding is based on the application of September 21, 1973 (R. 1), filed with the Federal Power Commission (Commission) in Docket No. E-8414 by the Power Authority of the State of New York (PASNY), 1/ seeking authorization, in the form of a Presidential Permit to be issued by the Commission pursuant to Executive Order No. 10485, 2/ to construct, operate, maintain and connect certain limited electric transmission facilities at a point on the United States-Canadian boundary in the town of Fort Covington, Franklin County, New York. The purpose of the connection point was to allow PASNY to import Canadian electric power to help meet New York's summer power demands.

PASNY described the border facilities, for which the Presidential Permit was sought, as "a single circuit steel lattice-type tower with supporting structure, land and appurtenant facilities to be owned, constructed, operated and

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1/ "A Corporate municipal instrumentality, a body corporate and political subdivision of the State of New York exercising governmental and public powers" (R.3), including the authority "to construct and operate facilities for the transmission of electric energy" (R. 4).

2/ September 3, 1953, 3 C.F.R., 1949-1953 Comp., 970.

maintained by [PASNY] connected at the international border with a similar 765 kv circuit suspended from a similar tower on the Canadian side of the border" (R. 5). PASNY stated that separate application had been made to the Public Service Commission of the State of New York (PSCNY), as required by Article VII of the New York Public Service Law, for a Certificate of Environmental Compatibility and Public Need in regard to those transmission line facilities needed in New York to transmit power to and from the connection point at the Canadian border (R. 5). 3/

In response to the Commission's notice of PASNY's application for Presidential Permit, issued October 16, 1973 (R. 45), the Greene County Planning Board (Board) filed its petition to intervene on November 7, 1973 (R. 47), alleging, in part, that the facilities covered by the application would harm the environment of their immediate location and would, in addition, be part of a wider plan which the Board felt to be unnecessary and ill-planned (R. 48). With regard to the

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3/ It should be emphasized that the facilities for which the Presidential Permit was sought from the Federal Power Commission consist essentially of one steel tower and a few hundred feet of cable stretching to the vertical plain at the border.

latter allegation, the Board referred to "a comprehensive integrated plan," which was said to include the Blenheim-Gilboa hydroelectric project (Commission Project No. 2685), the proposed Breakabeen hydroelectric project (Commission Project No. 2729), and "additional generating and transmission facilities" which, the Board feared, would have "a materially adverse impact on Greene County" (R. 47).

Board stated its opposition to the permit application and contended that proceedings on the application should not be conducted separately from the proceedings relating to the Blenheim-Gilboa and Breakabeen projects. 4/ In this regard, it requested (1) a public hearing on the permit application, (2) an environmental impact statement as to the border facilities "and the entire 765 kv network, and related generation, of which" the border facilities would be a part, and (3) "consolidation of the issues in Docket No. E-8414 with" those in Project Nos. 2685 and 2729 (R. 48-49).

On November 16, 1973, PASNY filed with the Commission, its answer to Board's petition to intervene (R. 51). In

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4/ Blenheim-Gilboa Project No. 2685 has been licensed by the Commission. Breakabeen Project No. 2729 has been proposed and is the subject of separate licensing proceedings before the Commission.

opposing such intervention, as well as the requests in the petition, PASNY stressed the geographic distance (R. 53-54) and lack of connection, between the proposed border facilities and the electric generation and transmission facilities in Greene County (R. 56-57). It also emphasized that the transmission line facilities needed to transmit power to and from the border crossing point were the subject of a separate proceeding before PSCNY and would be considered at length by that Commission with the aid of public hearings (R. 54). PASNY noted that these related facilities would meet the existing state-wide interconnected transmission system at a point near Utica, some 70 miles from Greene County (R. 54).

The thrust of PASNY's answer -- that Board had failed to show any real interest in the issues involved in the application for Presidential Permit -- is demonstrated, in part, by its statement that the petition "contains speculative and conclusory allegations with respect to possible or proposed generating facilities" and a wholly separate transmission facility (R. 55). The referenced transmission facility is the Gilboa-Leeds transmission line, to be constructed from the Blenheim-Gilboa hydroelectric project to Leeds, New York. Completely separate and extensive proceedings, of which

Board has been a part, have taken place at the Commission concerning the location and design of that transmission line which, as a specific part of a non-Federal hydroelectric project, is required to be licensed under Part I of the Federal Power Act (Act)(16 U.S.C. §792, et seq.).

Because "[t]here is no physical or logical connection between" Blenheim-Gilboa or the proposed Breakabeen Project and the border crossing facilities for which a Presidential Permit is required (R. 56), P\SNY saw no basis for Board's intervention or the granting of its requests.

On December 10, 1973, Peter J. O'Reilly (O'Reilly), not a party to the proceeding before this Court, filed out of time 5/ his petition to intervene in Docket No. E-8414 (R. 74). While O'Reilly stated that the facilities to be authorized by the Presidential Permit would adversely affect Lewis County, New York, his expressed concern related not to the border crossing facilities themselves, but rather,

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5/ In its notice of October 16, 1973, the Commission had established November 7, 1973, as the final deadline for the filing of such petitions (R. 45).

to the proposed transmission line which would be connected to the border crossing facilities. 6/ He made requests similar to those set out in Board's petition, although he did not urge the consolidation of Docket No. E-8414 with Project Nos. 2685 and 2729 (R. 75).

Also on December 10, 1973, the Association for the Preservation of Durham Valley (Association), not a party to the proceeding before this Court, filed out of time its petition to intervene in Docket No. E-8414 (R. 76). Like Board, it expressed concern as to lands within Greene County, and its discussion of the border crossing facilities revealed a position similar to that of Board. In fact, the requests made by Association in its petition were identical to those made earlier by Board (R. 77-8).

PASNY responded to the petitions to intervene by both O'Reilly and Association by filing separate answers with the Commission on December 21, 1973 (R. 81 and 88, respectively).

6/ Although the transmission line facilities needed to connect the border crossing point with the existing interconnected system are proposed to pass through Lewis County, the border crossing facilities themselves are not in Lewis County. Again, the connecting transmission line is under the regulatory jurisdiction of PSCNY.

In regard to O'Reilly, PASNY argued that his belief that the border facilities for which the Presidential Permit was sought would affect Lewis County, New York, was mistaken, since that county was located many miles south of the crossing point (R. 84). PASNY opposed his intervention, as well as the requests made in his petition, pointing out that his concerns should not be addressed to the Commission but to PSCNY, the body having jurisdiction over the transmission line facilities which would pass through Lewis County. 7/ It stated that O'Reilly had "not claimed any interest in any matter over which the [Federal Power] Commission has jurisdiction in this proceeding" (R. 84).

With respect to Association's petition to intervene, PASNY essentially restated its earlier comments made in regard to Board's similar petition, declaring that:

> No direct connection between the terminus of the transmission line from the Canadian border near Utica and Project Nos. 2685 and 2729 is presently planned or proposed. If such a direct connection is ever constructed, it will be constructed for the purpose of strengthening the statewide interconnected transmission system and not specifically for the purpose of linking Project Nos. 2685 and 2729 with the border crossing involved in this Presidential Permit application. ... such a direct link may never be constructed since it is only one of several possible methods of strengthening the statewide interconnected transmission system in that area of the state. (R. 93.)

7/ As noted, a proceeding is ongoing at PSCNY pursuant to PASNY's application, under State law, for a Certificate of Environmental Compatibility and Public Need as to such facilities.

In opposing Association's intervention and requests, PASNY went on to note that, while the border facilities would be "indirectly interconnected through the facilities of others to [for example] the facilities involved in Project Nos. 2685 and 2729," such incidental connection would only exist because of the general policy favoring the interconnection of all electric generating and transmission facilities, an important and widespread practice among utilities which aids electrical system reliability and is common in the State of New York and throughout the United States.

While the Commission was considering PASNY's application, the Congress enacted the Energy Supply and Environmental Coordination Act of 1974 (P.L. 93-313, 88 Stat. 246), whose Section 7(d) specifically related to the border crossing facilities at issue.

Following the filing of the above-referenced petitions to intervene in Docket No.E-8414 and PASNY's answers thereto, the Commission continued to gather information needed for its consideration of the issues involved in the application for Presidential Permit. For example, it received on July 8, 1974, in response to its specific request, supplementary information from PASNY (R. 100) which included a copy of the

contract entered into by PASNY and the Quebec Hydro-Electric Commission (Hydro-Quebec) concerning the proposed transfer of power which necessitated the border crossing facilities (R. 102).

The Commission proceeded solely under the terms of Executive Order No. 10485 of September 3, 1953, which requires the Commission to perform certain functions previously performed by the President in regard to electric power facilities on the borders of the United States. The Commission did not proceed under the terms of the Federal Power Act.

One of the requirements of this Executive Order is that the Commission obtain the "favorable recommendations of the Secretary of State and the Secretary of Defense" with respect to any Presidential Permit which the Commission proposes to issue. On August 2, 1974, essentially identical letters were sent by the Chairman of the Commission to the Secretary of Defense (R. 120) and the Secretary of State (R. 124). They set forth, at some length, the facts of the permit application proceeding, including a description of the proposed border crossing facilities, the rationale underlying

the proposed power transfer 8/ and the essential terms of the agreement between PASNY and Hydro-Quebec. The letters also noted that:

> An environmental impact statement with respect to the Commission's issuance of the permit under Executive Order No. 10485 to PASNY for the Fort Covington facilities is not required by reason of Section 7(d) of the Energy Supply and Environmental Coordination Act of 1974 (Public Law 93-319, approved June 22, 1974, 88 Stat. 246), ...

In order to facilitate consideration of the proposed permit by the Secretary of Defense and the Secretary of State, the letters included a draft of the proposed permit as well as copies of PASNY's application and other materials filed with the Commission in regard to the application (R. 126).

On August 19, 1974, the Commission received the response of the Department of Defense (R. 128). Noting that "the purpose of this transmission line is to transmit power from Canada into the United States," the Department declared that it was "not aware of any existing reason to withhold approval

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8/ The contract between PASNY and Hydro-Quebec declares that "an interconnection between the power systems in Quebec and New York will be mutually advantageous because of the diversity between their respective system loads" (R. 103).

of the request" of PASNY and that the "language of the draft permit ... [was] acceptable ..." (R. 128). 9/

On August 26, 1974, the Commission received the response of the Department of State which declared, in part:

> The Department has considered the material enclosed with your letter and supports the issuance of the permit in order to expedite the prompt construction of facilities for the importation of hydroelectric energy thereby helping to assure an adequate energy supply for New York. The Department finds the language in the draft permit acceptable and has no revisions or additions to suggest (R. 129).

On September 13, 1974, the Commission issued its Order Granting Interventions and Denying Requests for Hearing and Consolidation in Docket No. E-8414 (R. 130). Therein, the Commission specifically noted the contentions of Board, set forth in its petition to intervene of November 7, 1973 (discussed, supra). It also stated that "similar allegations [were] asserted and relief requested" in the petitions to intervene filed out of time by Association and O'Reilly

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9/ The Department did make a minor addition to the permit language, designating the Division Engineer in "New York City" as the Corps of Engineers representative with respect to the border crossing facilities.

(R. 131). The Commission went on to note PASNY's primary answer to each petitioner--i.e., that there had been no showing of any legitimate interest with respect to the permit proceeding and no demonstration of any direct connection between the proposed border crossing facilities and Project Nos. 2685 and 2729 (R. 131).

While it found that petitioners' participation in Docket No. E-8414 "may be in the public interest" and therefore granted all petitions to intervene, the Commission held that, pursuant to the Energy Supply and Environmental Coordination Act of 1974, Public Law 93-313, 88 Stat. 246 (ESECA), petitioners' requests for a hearing, an environmental impact statement, and a consolidation of proceedings should be denied (R. 132). In so doing, it set out, in full, Section 7(d) of that Act:

> In order to expedite the prompt construction of facilities for the importation of hydroelectric energy thereby helping to reduce the shortage of petroleum products in the United States, the Federal Power Commission is hereby authorized and directed to issue a Presidential permit pursuant to Executive Order 10485 of September 3, 1953, for the construction, operation, maintenance, and connection of facilities for the transmission of electric energy at the borders of the United States without preparing an environmental impact statement pursuant to section 102 of the National Environmental Policy Act of 1969 (83 Stat. 856) for facilities for the transmission of electric energy between Canada and the United States in the vicinity of Fort Covington, New York.

The Commission emphasized its belief that Section 7(d) was an explicit statement by Congress that the Presidential Permit sought by PASNY should be issued as soon as possible. "Requests made to the Commission by petitioners ... clearly must yield to the strong Section 7(d) exemption and directive charged the Commission by the Congress on June 22, 1974" (R. 132).

Also on September 13, 1974, the Commission issued its permit with respect to the border crossing facilities (R. 135).

The permit specifically declares that the Secretaries of State and Defense "favorably recommended that the Permit be granted" (R. 136). It also sets out the Commission's finding that the permit's issuance is in the public interest. 10/ In addition, it states that the permit was issued:

> Pursuant to Section 7(d) of the Energy Supply and Environmental Coordination Act of 1974 (Public Law 93-319, approved June 22, 1974, 88 Stat. 246), the provisions of Executive Order No. 10485, dated September 3, 1953, and the Commission's Rules and Regulations under said order, ... (R. 136).

The permit makes clear that the Commission's authorization of the border crossing facilities is not unconditional. Article 1 declares:

> The facilities herein described shall be subject to all conditions, provisions and requirements of this Permit. This Permit may be modified or revoked by the President of the United States or by the Commission, and may be amended by the Commission on proper application therefor (R. 137).

Article 3, for example, states, in part:

> The operation, maintenance and connection of the aforesaid facilities shall be subject to the inspection and approval of the Division Engineer Corps of Engineers, United States Army in New York City, who is in charge of the district affected herein, and a

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10/ "Upon consideration of this matter, the Commission finds that the issuance of the Permit as hereinafter provided is appropriate and consistent with the public interest" (R. 136).

> representative of the Commission, both of whom shall be authorized representatives of the United States for such purposes (R. 137).

In addition, Article 10 declares, in pertinent part:

> When in the opinion of the President of the United States, evidenced by a written order addressed to Permittee, the safety of the United States demands it, the United States shall have the right to enter upon and take possession of the facilities, or any part thereof, owned, operated, maintained and connected by Permittee under this Permit, ... (R. 139).

On September 24, 1974, Board filed its application for rehearing of the Commission's September 13 order as well as its issuance of the Presidential Permit on that date (R. 140). Board asserted that the Commission had misinterpreted Section 7(d) of ESECA by concluding that it exempted the border crossing facilities from the terms of the National Environmental Policy Act of 1969 (NEPA) and the Federal Power Act.

Specifically, Board contended that while Section 7(d) of ESECA excused the preparation by the Commission of an environmental impact statement under Section 102(2)(C) of NEPA, it did not direct the immediate issuance of the Presidential Permit and did not suspend the requirements of Section 102(2)(D),(A), and (B) of NEPA (R. 140). Board also declared that Section 7(d) did not "abrogate the Commission's comprehensive planning responsibilities under the Federal Power Act." (R. 140.)

As a result, Board asserted that the Commission should not have issued the Presidential Permit without first ordering a public hearing (R. 140). It also alleged that it had not been given an opportunity to be heard with respect to the permit and that the Commission had erred by not properly studying appropriate alternatives and by not making a systematic, interdisciplinary analysis before issuing the permit for the border crossing facilities (R. 140). Board urged that rehearing be granted and that the permit be withdrawn "until the Commission processes the application in accordance with the law." (R. 140.)

On September 30, 1974, O'Reilly filed his application for rehearing of the Commission's September 13 order and the Presidential Permit, issued on the same date. Using nearly identical language, O'Reilly made all but a few of

the contentions which had been put forth by Board in its application for rehearing.

Thereafter, on October 25, 1974, the Commission issued its Order Denying Petitions for Rehearing, with respect to the applications filed by Board and O'Reilly (R. 144). 11/ With respect to the application of NEPA to the border crossing facilities, the Commission noted that both the Board and O'Reilly conceded that Section 7(d) of ESECA expressly eliminated the requirement that an environmental impact statement be prepared (R. 146-7). In response to the parties' contentions that other provisions of Section 102(2) of NEPA imposed additional, separate requirements -- other than the preparation of an impact statement -- which would still apply to these facilities, the Commission referred to the legislative history of ESECA and stated its belief that "[t]hat history discloses that Congress intended all provisions of NEPA to be inapplicable to the Commission's action concerning the transmission facilities ... covered by the Permit" [Emphasis supplied] (R. 147). It pointed to the Conference Report covering ESECA and the specific state-

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11/ The third intervenor, Association for the Preservation of Durham Valley, did not apply for rehearing of the Commission's September 13 actions.

ment therein that the version of Section 7(d) eventually enacted provided "an exemption of a Canada - New York State transmission line from the requirements of [NEPA]." See House Report No. 93-1085, June 6, 1974, 93rd Congress, 2nd Session, page 41 (R. 147).

Next, the Commission rejected the parties' contention that PASNY's application for the Presidential Permit was subject to the provisions of the Federal Power Act, specifically, the "comprehensive plan" requirement of Section 10(a) of the Act [16 U.S.C. §803(a)] (R. 147). The Commission pointed out that the permit application was not filed under the Act, but, rather, under the wholly separate terms of Executive Order No. 10485 (R. 147). It explained that the border crossing facilities would not be a "project" within the meaning of Section 3(11) of the Act [16 U.S.C. §796(11)] and that its "licensing jurisdiction under Part I of the Act [which includes Section 10(a)] does not extend to" either the border facilities themselves or related facilities (R. 147-8).

In addition, the Commission stated that its encouragement of "the interconnection of electric systems located in the State of New York and the Province of Quebec through the issuance of the Permit to PASNY" was grounded in "certain authority delegated to it by the President of the United States

under Executive Order No. 10485" and was given specific impetus by Section 7(d) of ESECA (R. 148). It pointed out that such encouragement by it was not based on Section 202(a) of the Act [16 U.S.C. §824a(a)], for that Section merely imposes the duty "to promote and encourage the interconnection and coordination of electric generation and transmission facilities ... within the United States" [Emphasis supplied] (R. 148).

In response to the parties' contention that the Presidential Permit had been issued summarily, the Commission stated that "[I]n accordance with Congressional directions contained in Section 7(d) of [ESECA], [the Commission] issued the permit after fully complying with the requirements of Executive Order No. 10485, ..." (R. 148). In this regard, it noted that, while the language in Section 7(d) of ESECA "clearly indicate[d] a sense of urgency ... [and shows] that Congress expected the Commission to act on [the permit] application as soon as possible," the Commission nevertheless took the time needed to ensure that the issuance of the permit would be in the "public interest" and to obtain the "favorable recommendations" of the Secretary of Defense and the Secretary of State, as required by Executive Order No. 10485.

With regard to whether a public hearing should have been held before the permit was issued, the Commission specifically

stated that the objections of petitioners "to PASNY's application have been considered by the Commission and an evidentiary hearing on those objections is not necessary or appropriate for purposes of the Commission's discharge of its responsibilities under Section 7(d) [of ESECA] and Executive Order No. 10485" (R. 148). Further, the Commission pointed out that the parties who requested a hearing "do not reside in, or represent residents of, Franklin County, New York, where PASNY proposes to construct and operate the subject transmission facilities ..." (R. 149). It noted that Board's interest involved Greene County, some 180 miles south of the border crossing point, while O'Reilly was concerned with Lewis County, approximately 90 miles to the southwest. The Commission then stated that (R. 149):

> Prevention of physical, economic or environmental injury or damage to lives and property in Greene and Lewis Counties resulting from PASNY's construction and operation of transmission lines is primarily the responsibility of [PSCNY] rather than [the Commission] ...

This is so, the Commission emphasized, because its own (R. 149):

> ... jurisdiction over PASNY's transmission system extends only to those lines which are parts of hydroelectric projects or are located at the United States - Canadian border.

The Commission went on to state that PASNY had applied to PSCNY for approval of those transmission line facilities needed to transmit energy to and from the border crossing point

(R. 149). 12/ As a result, the Commission declared, the Board and O'Reilly should submit their objections as to the construction of PASNY's overall transmission system to PSCNY, the regulatory body having jurisdiction over the routing and design of the bulk of that system, including the line from the border crossing point to near Utica.

Finally, the Commission pointed out that "[n]o claims of injury or damage have been made in this proceeding by any resident or public official or agency of Franklin County" (R. 149). It is that New York county, of course, in which the specific border crossing facilities would be located. Nevertheless, the Commission emphasized, the Presidential Permit includes conditions which are designed to prevent "injury or damage in the area to be occupied by the proposed facilities" (R. 149). It pointed, in this regard, to Articles 3 through 6 and Article 8 of the permit.

The Commission concluded, therefore, that (R. 150):

> There are no factual issues relevant to this Commission's consideration of PASNY's application which require an evidentiary hearing for resolution.

12/ Such facilities, as noted, would extend many miles through the State of New York down to Marcy, near Utica, where they would meet the existing state-wide interconnected transmission system.

The Commission noted, as well, that a hearing would delay the "energy-saving objective of Section 7(d) of [ESECA]" and stated that no "useful purpose would be served by holding" a hearing (R. 150).

Before denying the applications for rehearing filed by Board and O'Reilly, the Commission emphasized that these parties had both been "afforded an opportunity to be heard," since they had been permitted to raise all of their objections to PASNY's permit application.

Thereafter, on December 16, 1974, Board filed with this Court the instant petition for review of the Commission's order of September 13, 1974, as well as the Presidential Permit itself, also issued on that date, and the Commission's order which denied rehearing, dated October 25, 1974.

ARGUMENT

I. Issuance Of The Presidential Permit In No Way Involved The Federal Power Act And Jurisdiction Conferred By It

Contrary to the persistent contention of Board that the Commission erroneously failed to proceed under the terms of the Federal Power Act in issuing the Presidential Permit to PASNY in this case, it is clear that that Act confers no jurisdiction and imposes no responsibilities as concerns the Commission's issuance of such permits. That Act at no point in its language mentions such permits, their issuance, or the facilities authorized by them. Board could point to no such language in its brief because it does not exist.

A. Part I Of The Act Was Not Involved In The Commission's Action

Part I of the Act, Section 3(11), 16 U.S.C. §796(11), defines a hydroelectric development. Section 4(e), 16 U.S.C. §797(e), confers jurisdiction on the Commission to license certain hydroelectric projects. The only aspect of such a project which is similar to the limited transmission line facilities at issue here is "the primary line or lines transmitting power [from the hydroelectric project] to the point

of junction with the distribution system or with the interconnected primary transmission system," 16 U.S.C. §796(11).

It is clear that the border crossing facility at issue here is not a "primary line" of any hydroelectric project licensed by the Commission. 13/ As a result, the Commission was compelled by existing law to find in its Order Denying Petitions For Rehearing, issued October 25, 1974, that its:

> * * * licensing jurisdiction under Part I of the Power Act does not extend to the 765 kv transmission line and related facilities which were the subject of PASNY's application (R. 147 and 148).

Despite this fact, Board repeatedly asserts that Part I of the Act applies to these border facilities by virtue of the "comprehensive plan" responsibility imposed on the Commission by Section 10(a) thereof, 16 U.S.C. §803(a). Section 10(a), however, by its own terms, only applies to "licenses issued under this Part." Since, as the Commission properly found, the border facilities do not require licensing under Part I, it follows that Section 10(a) does not apply in this case.

13/ Board, it should be noted, does not in its brief contend otherwise.

In the final analysis, Board's arguments on this point reduce to a plea that there is a great need for a single regulatory body having planning responsibility over all aspects of electric generation and transmission. Whatever the merits of that line of argument may or may not be, it is clear that such a contention is not relevant to this case. As the Supreme Court said in F.P.C. v. Louisiana Power and Light Co., 406 U.S. 621, 635-636 (1973),

> * * * a need for federal regulation does not establish FPC jurisdiction that Congress has not granted.

Here, it is apparent that the disputed border crossing facilities are not subject to Commission regulation under the provisions of Part I of the Act. 14/ If Board believes that the facilities should be subject to such regulation, it should address its arguments to Congress, and not to the Commission or this Court.

14/ Similarly, the transmission line facilities required to transmit power to and from the border crossing point are not regulated by the Federal Power Commission, but rather by PSCNY.

B. Part II Of The Federal Power Act Was Not Involved In The Commission's Action

While the main purpose of the border crossing facilities authorized by the Presidential Permit is to allow the importation of electric power by PASNY during summer months, it is true that the power contract between PASNY and Hydro-Quebec (R. 102) does provide for the possible exportation of power by PASNY. Board assumes from this that PASNY is required, under Section 202(e) of the Act, 16 U.S.C. §824a(e), to obtain formal Commission authorization for any exportation of power which might take place at the border crossing point here at issue.

Before discussing the substantive aspects of this argument, we must point out that Board failed to raise any issues concerning Section 202(e) of the Act in its application for rehearing (R. 140). As a result, assuming arguendo that this Court has jurisdiction to entertain this case under Section 313(b) of the Act, 16 U.S.C. §8251(b), the terms of that section preclude consideration by this Court of issues relating to Section 202(e). F.P.C. v. Colorado Interstate Gas Co., 348 U.S. 492 (1955), and Rhode Island Consumers Council v. F.P.C., 504 F.2d 203 (D.C. Cir. 1974).

Since this Court lacks jurisdiction to consider Board's arguments relating to Section 202(e), there is no reason for the Commission to respond to these contentions. We address the interpretation of Section 202(e) solely to explain what we believe to be the correct resolution of the definitional problem occasioned by Sections 201(f), 3(3), 3(4) and 3(7) of the Federal Power Act, 16 U.S.C. §§824(f), 796(3), (4), and (7), respectively, and arguments of Board in this case. 15/

15/ Section 201(f) removes from the scope of the Commission's general interstate public utility economic regulatory jurisdiction over "public utilities" the "* * * United States, a state or any political subdivision of a state, or any agency, authority or instrumentality of any one or more of the foregoing, or any corporation which is wholly owned, directly or indirectly, by any one or more of the foregoing * * * ." "Public utility" is a statutory term of art used in, and defined by, Parts II and III of the Federal Power Act, Section 201(e), 16 U.S.C. §824(e); and generally speaking, it means all investor owned electric utilities which own or operate facilities for the transmission or sale of electric energy at wholesale for resale in interstate commerce. Parts II and III of the Federal Power Act, 16 U.S.C. §§824-825r, are directed primarily to the regulation of those systems in contrast to publicly owned (Federal, state or local) or cooperatively owned systems which are borrowers from the Rural Electrification Administration. See, F.P.C. v. Florida Power & Light Co., 404 U.S. 453 (1972); Dairyland Power Cooperative, 37 FPC 12 (1967); Salt River Project v. Colorado-Ute Electric Association, Inc., 37 FPC 68 (1967) affirmed sub nom., Salt River Project Agricultural District v. F.P.C., 391 F.2d 470 (D.C. Cir. 1970), cert.

(Continued on page 31)

Section 202(e) declares that "no person shall" export power without Commission authorization. Administratively, the Commission has determined that a publicly owned electric system of a state does not fall within the exportation control authority of the Commission. See, the Presidential Permit issued on August 21, 1970, to the Lubec (Maine) Water and Electric District (attached hereto as Appendix A) where the Commission explicitly stated that state agencies, which fall within the definition of "municipalities" in Section 3(7) of the Act, 16 U.S.C. §796(7), are not required to obtain export authorizations under Section 202(e). (App. A, p. 1, fn. 1).

15/ (Continued from page 30) denied; Arkansas Valley G & T Inc. v. F.P.C., 393 U.S. 857 (1968). Such publicly owned and cooperatively owned systems are not properly classifiable as "public utilities." Other sections of Parts II and III of the Federal Power Act do apply to publicly owned or cooperatively owned systems. See, for example, the war-time or emergency power supply provisions of Section 202(c), the accounting and depreciation provisions of Section 303, and the general information gathering and reporting jurisdiction of Section 311 thereof.

Consciously uncoordinated with this definition of "public utility," there are additional definitions in Part I of the Federal Power Act, 16 U.S.C. §§792-823. Under Section 3(4), "person" is equated to "individuals or corporations." Sections 3(3) and 3(7) have the effect of excluding "municipalities" or publicly owned systems from the term "corporation." See, United States v. Public Utilities Commission, 345 U.S. 295, 312 (1953).

Accordingly, while we believe that the combined effect of the language of Sections 201(f), 202(e), 3(3), 3(4), and 3(7) of the Act relieves state authorities like PASNY from the export regulatory controls imposed by Section 202(e), we hasten to add that such sections do not bar the application of the provisions of Parts II and III of the Act to state owned electric systems in all circumstances, 16/ nor do they preclude the hydroelectric licensing jurisdiction of Part I of the Act from applying to PASNY and similar publicly owned electric utilities. 16a/ With particular reference to Section 201(f), what the Act does is to make clear that publicly owned systems are not precluded from taking advantage of those provisions of Part II which establish regulatory protections and benefits. 16b/ Regulatory requirements which are imposed upon such systems pursuant to the Act, Parts II and III, are as set forth in the Act.

16/ See note 15, supra.

16a/ PASNY is the licensee for Federal Power Commission Project Nos. 2000, 2216 and 2685.

16b/ See, e.g., Otter Tail Power Company v. F.P.C., 429 F.2d 232 (8th Cir. 1970) cert. denied, 401 U.S. 947 (1971), and cases cited therein.

C. There Is No Direct Connection Between The Border Point And The Hydroelectric Projects Associated With Greene County

While the foregoing discussion establishes that the Presidential Permit was not issued under the terms of the Federal Power Act, it is important to point out, as PASNY did before the Commission, that, contrary to the contentions of Board, there is little or no connection between the border crossing facilities and those hydroelectric projects under Commission jurisdiction which are closely associated with Greene County (i.e. Blenheim-Gilboa and Breakabeen). As repeatedly stated, the limited facilities authorized by the permit would begin and end within a few hundred feet of the Canadian border. Board's apparent belief (see page 2 of its brief) that the permit would authorize "hundreds of miles of extra high voltage transmission lines" is clearly inaccurate.

Beyond this, Board, as noted by PASNY, engages in pure speculation when it assumes that the line needed to carry

power between the border crossing point and Edic, near Utica, 17/ will necessarily be extended to Gilboa. 18/ Board conveniently fails to note the present existence of a line running from Edic to Albany and then south to Leeds and Pleasant Valley, a line which completely bypasses Gilboa and is fully capable of carrying the Canadian power flowing from the border crossing point. PASNY has stated that no direct connection between Edic and Gilboa "is presently planned or proposed" (R. 93). Further, PASNY has declared:

> If such a direct connection is ever constructed it will be constructed for the purpose of strengthening the statewide interconnected system * * *. In any event, such a direct connection will not be needed, if at all, until at least the early 1980's, * * *. In fact such a direct link may never be constructed * * * (R. 93). 19/ (footnote added)

17/ As noted, this line is under the jurisdiction of PSCNY. That Commission, therefore, is the proper forum for those issues relative to that line which Board feels are of importance.

18/ See, specifically, Board's description on pages 4 and 5 of its brief.

19/ Again, if and when such a line is built, it will have to be authorized by PSCNY.

These facts directly contradict statements such as the one made by Board at page 22 of its brief that:

> * * * Project No. 2685 [Blenheim-Gilboa] involves, as a "primary line", 16 U.S.C. 796(11), a 35 mile proposed segment within Greene County of the 765kv line which will go from Canada via the Canadian Connection toward New York City.

The 35-mile line referred to by Board is a part of the Blenheim-Gilboa project. If it were not, it would not be affected by the Commission's licensing jurisdiction under Part I of the Act. As noted by PASNY, it is not even proposed that this line be included in a line stretching from the Canadian border to New York.

This lack of connection between the hydroelectric project facilities associated with Greene County and the border crossing facility authorized by the Presidential Permit further demonstrates the complete invalidity of Board's contention that the Act somehow applied to the Commission's authorization of the border crossing facility. 20/

20/ It should be noted, as well, that such a lack of connection raises serious questions regarding Board's standing to seek review of the Commission's action in this instance. See, generally, Sierra Club v. Morton, 405 U.S. 727 (1972). It is clear, as well, that the Commission's act of granting Board's intervention does not preclude a finding by this Court of a lack of standing. See, ordering paragraph (c) of the Commission's order of September 13, 1974, which, in part, granted Board's intervention (R. 132 and 133).

Once again, it is the jurisdiction by PSCNY which provides the proper forum in which Board, and others with like concerns, should raise those issues which they feel are relevant with respect to the planning and possible construction of PASNY's over-all electric transmission system. As noted herein, PSCNY is now considering the line which would be needed to carry power from the border crossing point. Evidence is being received and hearings are being held by PSCNY with respect to the issues which Board erroneously contends should have been considered by the Federal Power Commission. Quite clearly, the apparent desire on the part of Board for a Federal as opposed to a State forum cannot obviate the will of Congress, as expressed in the limited language of the Federal Power Act.

D. Executive Order No. 10485 Delegates An Executive Function To The Commission.

It is clear that the Commission performs an essentially executive function when it issues Presidential Permits, such as the one in this instance. Unlike the Commission's Congressionally delegated duties under the Federal Power Act, this function is rooted in the President's powers with respect to foreign relations and, to a degree, his role as Commander-in-Chief of the armed forces.

Executive Order No. 10485 (attached hereto as an Appendix) was preceded by Executive Order No. 8202, issued July 13, 1939. Executive Order No. 8202 called for the Commission to receive permit applications but then to make recommendations to the President, who retained the power to grant permits and to impose conditions. As will be discussed below, Presidents had, for some 70 years, exercised such power with respect to various types of physical connections with foreign countries. There is some indication, in this regard, that Executive Order No. 8202 was issued in an effort to obtain a degree of uniformity in the granting and conditioning of Presidential Permits.

An early, authoritative discussion of this Presidential power over physical connections with foreign countries is

found in an opinion sent by the Acting Attorney General to the Secretary of State, dated January 18, 1898. 21/ It sets out a view which apparently was first expressed by President Grant and continues today as the basis for delegations such as Executive Order No. 10485. It is that the President has the power, absent specific Congressional action, to prevent and, thus, to permit conditionally, physical connections, such as electric transmission lines, with foreign nations.

The opinion contains language which makes clear the nature of the underlying authority for such Presidential power.

> The preservation of our territorial integrity and the protection of our foreign interests is intrusted, in the first instance, to the President. ..., the President is not limited to the enforcement of specific acts of Congress....
>
> * * *
>
> The President is not only the head of the diplomatic service, but commander in chief of the Army and Navy....
>
> Treating a cable simply as an instrument of commerce, it is the duty of the President, pending legislation by Congress, to impose [necessary] restrictions ... (22 Op. Att. Gen. at 25, 26, 27.)

21/ 22 Op. Att. Gen. 13.

The opinion points out, as well, a judicial decision which supports the belief that the President, absent action by Congress, has the power to prevent or permit foreign physical connections. In a case dealing with a foreign telegraphic cable, 22/ Federal Circuit Judge Lacombe declared (77 F. 496):

> ... [W]ithout the consent of the general government, no one, alien or native, has any right to establish a physical connection between the shores of this country and that of any foreign nation. Such consent may be implied as well as expressed, and whether it shall be granted or refused is a political question, 23/ which, in the absence of congressional action, would seem to fall within the province of the executive to decide.... (Footnote added.)

A later opinion by the Attorney General, in a letter to the President on August 14, 1913 (30 Op. Att. Gen. 217), further supports such executive power. In response to the specific question of whether the President had "any authority to control the importation into this country from Canada of

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22/ U.S. v. La Compagnie Francaise Des Cables Telegraphiques, et al., 77 F.495 (Circuit Court, S.D. New York, 1896).

23/ This judicial statement, that a decision with respect to something like a Presidential Permit "is a political question," raises the issue of whether this case is non-justiciable and, thus, not subject to adjudication by this Court. See, generally, Baker v. Carr, 369 U.S. 186 (1962).

electric current ..." (Id. at 221), the Attorney General declared that the President was:

> ... free to control the matter under [his] plenary power to prevent any physical connection (not authorized by Congress) between any foreign country and the United States. (30 Op. Att. Gen. at 221.)

The Attorney General continued by stating:

> The executive power (subject, of course, to affirmative control by Congress) has been recognized as controlling the laying of cables between the United States and foreign countries ... (Citations omitted.)(30 Op. Att. Gen. at 221.)

He concluded by making clear that:

> These authorities are applicable to the present subject, and in the absence of legislation by Congress you may not only prohibit the importation of electric power to this country from Canada, but may also grant permission therefor subject to such conditions as to you may seem good. (30 Op. Att. Gen. at 222.)

The foregoing shows the basis for Executive Order No. 8202 and, thus its successor, Executive Order No. 10485, which delegated to the Commission the actual decision of whether and under what conditions Presidential Permits should be issued. It further shows that Board is incorrect when it states, at page 19 of its brief, that Executive Order No. 10485 "is a child of the Federal Power Act." The essentially executive function of permitting physical connections with

foreign nations was performed by Presidents for years prior to the Act's passage.

While it is true that Executive Order No. 10485 refers to Section 202(e) of the Act, it must be emphasized that it is referenced in the preamble. As such, it merely explains, in part, why the President delegated to the Commission the duty to issue permits with respect to electric transmission line connections with foreign nations. It does not even suggest that the Act is the statutory basis for Executive Order No. 10485.

As has been discussed at some length herein, Section 202(e) is not involved in this proceeding. While applicants for Presidential Permits must often apply as well for Section 202(e) export authorization, it is established that PASNY is not such an applicant. The two requirements exist separately, have different bases of authority, and need not both apply in every border crossing situation.

Beyond this, it is obvious that the Commission's Regulations with respect to Executive Order No. 10485 (attached hereto as an Appendix) do not, as Board states at page 20 of its brief, "specifically integrate the Executive Order with Section 202(e)." Section 32.50(b) of the Regulations

[18 CFR §32.50(b)] does nothing more than direct attention to those Regulations dealing with Section 202(e) authorization. While this is another indication that Section 202(e) authorization is often required in addition to the procurement of a Presidential Permit, it does not establish that the Section 202(e) requirement applies in every situation where a Presidential Permit is needed.

It is clear, therefore, that the power delegated to the Commission by Executive Order No. 10485 is unique in comparison to those powers conferred by Congress under the Act. They are indeed separate, notwithstanding Board's inability to understand that one agency can be given different functions by different branches of the government.

II. Because The Commission's Action Did Not Involve The Federal Power Act, It Cannot Be Reviewed Under Section 313(b)

The language of Section 313(b) of the Act expressly declares that:

> Any party to a proceeding under this Act aggrieved by an order issued by the Commission in such a proceeding may obtain review of such order in the [appropriate United States Court of Appeals] ... [Emphasis supplied].

Because it is clear that the Commission's authorization of the border crossing facilities was not "under" the Act, there can be no review by this Court of the Presidential Permit and its related orders on the basis of Section 313(b). Quite simply, there is no subject matter jurisdiction.

It is settled that this Court, as a United States Court of Appeals, is not a court of general jurisdiction. 24/ Its jurisdiction arises from specific, separate grants of power by Congress (449 F.2d at 464). The only such grant relied on by Board in this proceeding is Section 313(b) of the Act (see its brief at page 1). 25/ Because that Section is not applicable, this proceeding should be dismissed for lack of jurisdiction.

24/ See, e.g., Arizona State Department of Public Welfare v. Department of Health, Education and Welfare, 449 F.2d 456, 464 (9th Cir. 1971).

25/ It should be noted, as well, that no such specific grant appears to exist in any statute which might apply with respect to this proceeding. Board has not referenced or relied on any other statute with respect to its claim of jurisdiction by this Court.

In addition, it is clear that Section 10 of the Administrative Procedure Act (APA) [5 U.S.C. §702, et seq.] does not provide a jurisdictional basis for Board in the instant proceeding. The decision in Rettinger v. F.T.C., 392 F.2d 454 (2nd Cir. 1968), supports the conclusion that a petitioner, such as Board, cannot rely on Section 10 of APA to provide that which Congress has failed to provide, i.e., a "statute adequately specif[ying] the proper procedure and court for review, ..." (392 F.2d at 457).

Once again, therefore, the instant proceeding should be dismissed because this Court lacks jurisdiction.

III. The Commission Fully Met The Requirements Of Executive Order No. 10485 And Properly Interpreted Section 7(d) Of ESECA In Issuing The Presidential Permit 26/

A. Section 7(d) Of ESECA Exempted This Proceeding From All Requirements Of NEPA And, Further, Constituted An Express Direction By Congress To The Commission To Issue The Permit To PASNY As Soon As Possible

The Congress, on June 22, 1974, some nine months after PASNY filed its application for the Presidential Permit, enacted ESECA, which, in Section 7(d), specifically refers to the border crossing facility here at issue. 27/ That section, inter alia, "authorized and directed" the Commission to issue the Presidential Permit "pursuant to" the Executive Order "without preparing an environmental impact statement pursuant to Section 102 of" NEPA.

Such language, along with the explicit language of the most authoritative aspect of ESECA's legislative history, clearly established that the Commission was exempted from

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26/ As discussed, supra, the Commission does not believe this Court has jurisdiction in this instance under Section 313(b) of the Federal Power Act. Nothing contained in this section of the brief should be construed as a waiver of that argument.

27/ See the full text of that section, supra.

preparing and circulating an environmental impact statement regarding the border crossing facilities 28/ and, in addition, exempted these facilities from all other requirements of NEPA. As noted by the Commission in its order of October 25, 1974, (R. 147) the Conference Report, in regard to the version of ESECA eventually enacted, specifically states that Section 7 was intended to contain:

> * * * an exemption of a Canada-New York State transmission line from the requirements of the National Environmental Policy Act [Emphasis supplied]. 29/ (footnote added)

Notwithstanding this explicit and authoritative statement with respect to the applicable statutory language, Board contends that while Section 7(d) of ESECA exempts the preparation of an impact statement, it does not eliminate any of the other requirements said to be imposed by NEPA.

28/ Board, at page 13 of its brief, admits this fact.

29/ See, House Report No. 93-1085, June 6, 1974, 93rd Congress, 2nd Session, page 41. It should be noted, as well, that there appears to be no legislative history with respect to ESECA which conflicts with the clear statement of Congressional intent seen in the Conference Report.

In making its strained arguments on this point, Board erroneously focuses on the abstract question of whether or not NEPA does, in fact, impose requirements separate from the preparation of an impact statement. In this regard it relies on an extensive discussion of NEPA case law which, in Board's view, apparently demonstrates that there are separate and severable requirements under NEPA. There is no need for the Commission to respond to Board's contentions on this point because the issue here is clearly not whether NEPA in the abstract imposes separate requirements. Rather, the issue presented in this case is whether Congress, through its enactment of Section 7(d) of ESECA intended to exempt this Presidential Permit proceeding from all requirements of NEPA, whatever they might be.

As we have demonstrated above, the language of Section 7(d), when read in conjunction with the relevant legislative history, clearly indicates that Congress desired that this permit proceeding should be freed from all requirements imposed by NEPA. Any lingering doubts on this matter, however, are quickly resolved when the language and legislative history

of ESECA are considered in light of that statute's obvious overall purpose, i.e. the encouragement of the prompt approval of the border crossing facilities. There is no question that compliance with NEPA necessarily delays administrative proceedings. 30/ Board's restrictive reading of Section 7(d), therefore, is clearly inconsistent with ESECA's purpose. 31/

In support of its restrictive reading of Section 7(d), Board relies heavily on the differences between the language used in that statute, and the language used in the Trans-Alaskan Pipeline Authorization Act (TAPA), 43 U.S.C. §1651, et seq. The factual setting in which these two statutes were enacted were, of course, very different, since, in the case of TAPA, an environmental impact statement had already been prepared prior to the passage of the Congressional exemption

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30/ In Greene County Planning Board v. F.P.C., 455 F.2d 412, 422 (2nd Cir. 1972), this Court noted that "Delay is a concomitant of the implementation of the procedures prescribed by NEPA * * *"

31/ It should be noted that compliance with NEPA in this case, to the extent Board suggests is still required, would necessarily substantially delay the issuance of the Presidential Permit.

from NEPA. In any event, there is no requirement that Congress must, in all instances, use identical language to bring about identical results. Similarly, Board's contention that the language used in Section 7(c) of ESECA somehow supports a restrictive reading of Section 7(d) is without merit. On the contrary, the language of Section 7(c), like the language of TAPA, is simply insufficient to overcome the inference raised by the language, legislative history, and overall purpose of Section 7(d) itself. Those three factors, we submit, establish that the Commission's interpretation of Section 7(d) was correct, and that the Board's contrary interpretation was unreasonable.

While it is clear, on the basis of the foregoing, that the Commission properly interpreted Section 7(d) of ESECA, in concluding that all NEPA requirements were exempted by it, it is just as evident that Section 7(d), in other ways, encouraged the Commission to issue the Presidential Permit as soon as possible.

Prior to its exemption of the requirements of NEPA with respect to the Commission's authorization decision, Congress clearly expressed its strong intention that the NEPA exemption

was to be interpreted, at a minimum, as specific encouragement to the Commission to authorize the border crossing facilities as soon as possible. The Congress declared, in the opening phrases of Section 7(d) of ESECA, that:

> In order to expedite the prompt construction of facilities for the importation of hydroelectric energy thereby helping to reduce the shortage of petroleum products in the United States, the Federal Power Commission is hereby authorized and directed to issue a Presidential permit pursuant to Executive Order 10485 * * *

In its Order Denying Rehearing of October 25, 1974, (R. 144), the Commission emphasized the importance of this separate aspect of Section 7(d) with respect to its decision to issue the Presidential Permit. It properly interpreted Section 7(d), not as a usurpation of the authority delegated by the President to the Commission by means of Executive Order No. 10485, but as a complimentary statement by the Legislative branch. The Commission expressly stated (R. 148) that it had complied with the will of Congress by acting as soon as possible but that, just as importantly, it had acted within

the requirements of the Executive Order. This was entirely correct, for it is clear that the Executive Order provided the underlying authority for the Commission's action, just as Congress recognized when it enacted Section 7(d) of ESECA.

While Section 7(d), therefore, did not infringe on the essentially Executive function embodied in the Commission's authorization of the border crossing facilities, it surely did represent the will of Congress that, in this specific instance, the Commission should exercise its delegated function as expeditiously as possible. As a result, this aspect of Section 7(d) was properly relied on by the Commission when it issued the Presidential Permit requested by PASNY.

B. The Commission Complied With All Applicable Requirements In Issuing The Presidential Permit and Related Orders

It is clear that the Commission, in this instance, acted under the terms of Executive Order No. 10485, its own Regulations dealing with the Executive Order, and Section 7(d) of ESECA. The Regulations, of course, detail those procedures which must be followed in applying for a Presidential Permit. PASNY, in this case, has fully complied with those requirements. As noted, the importance of Section 7(d), beyond its exemption of the requirements of NEPA, lies in its forceful expression of congressional intent that the power to be transferred by the Ft. Covington border crossing is crucially needed in the United States as soon as possible.

While Section 7(d) was, in this sense, important to the decision to issue the permit and, in fact, was properly relied on by the Commission in making that decision, the primary basis for the Commission's action was the Executive Order. It is the key source, in this case, of those substantive and procedural requirements by which the Commission's actions must be measured.

1. The Applicable Test In This Instance Is Whether The Commission's Action Was Arbitrary Or Capricious

Because the Federal Power Act is not involved in this case, the "substantial evidence" standard of judicial review set out in Section 313(b) of the Act, does not apply. Similarly, no such standard is set forth in Section 7(d) of ESECA or Executive Order No. 10485, and neither of these require a decision based on a record after opportunity for hearing. As a result, the applicable standard, assuming judicial reviewability, is essentially whether the Commission's action was arbitrary or capricious and consistent with applicable procedural requirements. Citizens to Preserve Overton Park v. Volpe, 401 U.S. 401, 413-14 (1971).

2. The Commission's Decision That The Public Interest Would Be Served By The Issuance Of The Presidential Permit Was Not Arbitrary Or Capricious

It is clear, of course, that the Commission made a specific finding with respect to the public interest aspect of the border crossing facility. In the permit itself, the Commission declared:

> Upon consideration of this matter, the Commission finds that the issuance of the Permit as hereinafter provided is appropriate and consistent with the public interest (R. 136).

Board, at page 25 of its brief, citing New York Central Securities Corp. v. U.S., 287 U.S. 12, 24 (1932) and Federal Radio Commission v. Nelson Brothers Bond & Mortgage Co., 289 U.S. 266, 285 (1933), expressly recognizes that:

> ... the 'public interest' standard in Federal administrative law is one which in order not be unconstitutionally vague, takes its meaning from the context of the regulatory scheme in which it is used.

Because the Commission's action, in this instance, was based on Executive Order No. 10485 and Section 7(d) of ESECA, they must be looked to in determining the public interest standard in this setting.

As has been discussed herein, the history of the executive authority delegated to the Commission by Executive Order No. 10485 demonstrates a concern for the nation's foreign relations and its military security. The Commission, in complying with the requirements of the Executive Order, specifically informed both the Departments of State and Defense (R. 124 and R. 120) of the permit application and received, in effect, their assurance (R. 129 and R. 128) that the public interest, in their view, would be served by the issuance of the permit.

Beyond this, it is clear that Congress, when it enacted Section 7(d) of ESECA, expressly and forcefully urged the Commission to issue the permit as soon as possible. This surely represents a conviction on the part of the Legislative branch that issuance is in the public interest. As noted, Congress also exempted the Commission's decision with respect to the permit from the provisions of NEPA.

These expressions of support for the authorization of the border crossing facilities were properly relied on by the Commission when it made the ultimate decision, as it was required to do under the delegation of authority by the Executive Order, that the public interest would be served by the issuance of the Presidential Permit.

In making that decision, the Commission was fully aware that, while no person with interests in the New York county in which the border crossing facilities would be located had objected to the permit's issuance, the public interest required that certain specific conditions be imposed on PASNY, the permittee, which would help mitigate several unavoidable adverse effects of the facilities. The various articles attached to the permit (R. 137-139) demonstrate that the

Commission, contrary to Board's contention at pages 31 and 32 of its brief, did, indeed, consider all relevant factors in issuing the permit.

It is clear, on the basis of the foregoing, that the Commission's finding that the permit's issuance would be in the public interest was not arbitrary or capricious.

3. The Commission Complied With All Procedural Requirements In Issuing The Permit

Just as Executive Order No. 10485 is the primary basis for the Commission's action in this case, so too does it impose the underlying procedural requirements. As has been noted, the Federal Power Act does not apply in this case, and Section 7(d) of ESECA, while exempting the provisions of NEPA, refers back to the Executive Order with respect to any procedural requirements.

Initially, of course, the Commission received and considered PASNY's permit application. In addition, it fully informed the Departments of State and Defense of the application and, then, received their favorable recommendations that the permit be issued. 32/ Finally, the Commission found the issuance of the permit to be in the public interest and imposed those conditions it felt were necessary. It is clear, therefore, that the Commission fully met those procedural requirements specifically set out in the Executive Order.

32/ The Executive Order does not impose on the two Executive departments the requirement that they use a specific phrase in responding affirmatively.

Beyond this, however, the Executive Order makes clear that the Commission is given discretion with respect to any other procedural steps which it may find necessary. Because there was no requirement of a public hearing in this case, 33/ the Commission was faced with the task of determining whether a public hearing was needed, in light of the specific factual setting as well as the purposes and limitations of Executive Order No. 10485 and Section 7(d) of ESECA. 34/ A review of the procedural history of this case demonstrates that the Commission did not abuse its discretion in denying Board's request for a public hearing.

Not only did the Commission issue public notice of PASNY's application, but it afforded the opportunity to file protests and petitions to intervene (R. 46). It received and considered Board's petition and discussed the points raised

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33/ Neither Executive Order No. 10485, Commission regulations under it, nor Section 7(d) of ESECA mention public hearings.

34/ See, generally, Mobil Oil Corp. v. F.P.C., 483 F.2d 1238, 1252-1254 (D.C. Cir. 1973), with respect to the flexibility of administrative procedures.

therein in its order of September 13, 1974 (R. 130). Beyond this, the Commission again considered the concerns of Board and treated them in its order of October 25, 1974 (R. 144). In addition, nothing prevented Board from making whatever additional submittals it felt necessary during the period in which the Commission was considering PASNY's application and responses made with respect to it.

Board clearly was afforded fundamental procedural due process by the Commission. Its points were not only heard but considered and discussed. It was the Commission's right and duty to exercise its discretion with respect to the points raised and requests made by Board in light of the specific authority delegated to it by Executive Order No. 10485 and the strong expression of Congressional intent seen in Section 7(d) of ESECA. Given that virtually all the points raised against the permit concerned speculations about matters not within the scope of the permit proceeding, it is apparent that the Commission did not abuse this discretion in deciding that the issues raised by Board did not require the holding of a public hearing with respect to its authorization of the border crossing facilities. 35/

35/ See, generally, Citizens for Allegan County, Inc. v. F.P.C., 414 F.2d 1125 (D.C. Cir. 1969).

In addition to requesting that a public hearing be held with respect to the application for Presidential Permit, Board also urged that the permit proceeding be consolidated with on-going proceedings at the Commission involving the Blenheim-Gilboa and Breakabeen hydroelectric projects.

Board is a full and active participant in these two licensing proceedings under the Federal Power Act, involving hydroelectric developments closely associated with Greene County. Environmental impact statements with respect to them have been or are being prepared. All relevant issues with respect to them have been or will be fully considered. Public hearings were held as to Blenheim-Gilboa. The Commission has not yet ordered public hearings as to the Breakabeen application, but it can be noted that the Commission in past years has ordered public hearings in similar situations involving significant local concern over proposed hydroelectric development. 36/

While it is clear, therefore, that the interests of Board have been and will be fully protected and considered in the two hydroelectric licensing proceedings, a more

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36/ In any event, it is clear that any complaints any party might have regarding the procedures followed with respect to the Breakabeen project can be raised on review of the relevant, final orders issued in that proceeding.

important consideration in the Commission's decision against consolidation was the lack of connection between them and the permit application proceeding. As has been noted herein, there is no legal connection and only an incidental and indirect physical connection. It follows that the decision not to consolidate was reasonable and clearly not an abuse of discretion.

It is axiomatic that an administrative agency given hydroelectric licensing jurisdiction by Congress under the Federal Power Act and totally separate delegated authority by the President with respect to border crossing facilities should be given wide discretion in deciding a consolidation request such as that made by Board in this instance. The Commission's decision was within "* * * basic requirements designed for the protection of private as well as public interest." F.C.C. v. Pottsville Broadcasting Co., 309 U.S. 134, 138 (1940).

It is clear, therefore, that the Commission complied with all applicable procedural requirements in issuing the Presidential Permit to PASNY.

CONCLUSION

On the basis of the foregoing, the Commission's orders should be affirmed and the Presidential Permit should not be disturbed.

Respectfully submitted,

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For Respondent
Federal Power Commission

MAY 14, 1975

PERMIT AUTHORIZING

LUBEC WATER AND ELECTRIC DISTRICT

TO CONSTRUCT, OPERATE, MAINTAIN AND CONNECT ELECTRIC TRANSMISSION FACILITIES AT THE INTERNATIONAL BORDER BETWEEN THE UNITED STATES AND CANADA

(Federal Power Commission - Docket No. E-7527)

Lubec Water and Electric District (hereinafter referred to as Permittee), a quasi-municipal corporation organized under the laws of the State of Maine, with its principal place of business at Lubec, Maine, in an application filed in Docket No. E-7527, on March 9, 1970, requested permission, pursuant to Executive Order No. 10485, dated September 3, 1953, to construct, operate, maintain and connect the electric transmission facilities described in Article 2 below at the international border between the United States and Canada. Permittee proposes to transmit electric energy from the United States to Canada over those facilities. 1/

The Secretary of State by letter dated June 23, 1970, and the Secretary of Defense by letter dated June 11, 1970, favorably recommended that the Permit be granted herein as hereinafter provided.

Upon consideration of this matter, the Commission finds that the issuance of a Permit as hereinafter provided is appropriate and consistent with the public interest.

1/ Permittee is a "municipality" within the meaning of Section 3(7) of the Federal Power Act and therefore is not required to secure Commission authorization under Section 202(e) of the Act to transmit electric energy from the United States to Canada by reason of Sections 201(f), 3(4) and 3(3) of the Act.

Pursuant to the provisions of Executive Order No. 10485, dated September 3, 1953, and the Commission's Rules and Regulations thereunder, permission is hereby granted to Permittee to construct, operate, maintain and connect the electric transmission facilities described in Article 2 below at the international border between the United States and Canada upon the following conditions.

Article 1. The facilities herein described shall be subject to all conditions, provisions and requirements of this Permit. This Permit may be modified or revoked by the President of the United States or by the Federal Power Commission, and may be amended by the Federal Power Commission on proper application therefor.

Article 2. The facilities covered by and subject to this Permit shall include:

That portion within the United States of a three-phase, 60 hertz, 4,160 volt, electric transmission line, partly overhead line, partly submarine cable, crossing the Canada-United States International Boundary from a point in Lubec, Maine to Campobello Island, Province of New Brunswick.

No substantial change shall hereafter be made in the above-described facilities and operation thereof authorized by this Permit unless and until such change shall have been approved by the Commission.

Article 3. The operation, maintenance and connection of the aforesaid facilities shall be subject to the inspection and approval of the Division Engineer, Corps of Engineers, United States Army, in New York, New York, who is in charge of the district affected herein, and a representative of the Commission, both of whom shall be authorized representatives of the United States for such purposes. Permittee shall allow officers or employees of the United States showing proper credentials free and unrestricted access into, through and across any lands occupied by said facilities in the performance of their official duties.

Article 4. In the operation, maintenance and connection of the facilities herein specified, Permittee shall place and maintain suitable structures to reduce to a reasonable degree the possibility of contact or inductive interference between its transmission facilities and any other facilities not owned by Permittee.

Article 5. If, in the future, it should appear to the Secretary of the Army that any facilities or operations permitted hereunder cause unreasonable obstructions to the free navigation of any of the navigable waters of the United States, Permittee may be required, upon notice from the Secretary of the Army, to remove or alter such of the facilities as are owned by it so as to render navigation through such waters free and unobstructed.

Article 6. Permittee shall comply promptly with any regulations or instructions affecting the facilities, or any part thereof, owned by it and covered by this Permit which may be issued by the President of the United States or any Government department or agency of the United States for the aid and protection of aerial navigation.

Article 7. Permittee shall be liable for all damages occasioned to the property of others by the operation, maintenance, and connection of the facilities owned by it and covered by this Permit, and in no event shall the United States be liable therefor. Permittee shall do everything reasonably within its power to prevent or suppress fires on or near any land occupied under this Permit.

Article 8. Permittee shall install and maintain adequate metering equipment to measure the flow of all electric energy transmitted from the United States to Canada over the aforedescribed line authorized herein; shall make, keep and preserve full and complete records with respect to the movement of such energy; and shall furnish in triplicate to the Commission, with respect to such transmission of energy, reports annually on or before February 15, showing, with respect to the aforedescribed line authorized herein, the gross amount of kilowatt-hours delivered, the maximum rate of transmission in kilowatts, and the consideration received therefor during each month of the preceding calendar year.

Article 9. Neither this Permit nor the facilities, or any part thereof, covered by this Permit, shall be transferable or assignable, but in the event of the involuntary transfer of the facilities by operation of law (including such transfers to receivers, trustees, or purchasers under foreclosure or judicial sale) the Permit shall continue in effect temporarily for a reasonable time thereafter pending the making of an application for a new Permit and decision thereon, provided notice is promptly given in writing to the Commission accompanied by a statement that the facilities authorized by this Permit remain substantially the same as before the transfer. Permittee shall maintain the facilities, or any part thereof, owned, operated, maintained and connected by it as described above in a condition of repair for the efficient operation of said facilities in the transmission of electric energy, and shall make all necessary renewals and replacements.

Article 10. Upon the termination, revocation or surrender of this Permit, the facilities herein authorized, which are owned, operated, maintained and connected by Permittee, shall be removed within such time as the Commission may specify and at the expense of Permittee. Upon failure of Permittee to remove such facilities or any portion thereof, the Commission may direct that possession of the same may be taken and the facilities removed at the expense of Permittee, and Permittee shall have no claim for damages by reason of such possession or removal.

Article 11. When in the opinion of the President of the United States, evidenced by a written order addressed to the holder of this Permit, the safety of the United States demands it, the United States shall have the right to enter upon and take possession of the facilities, or any part thereof, owned, operated, maintained, and connected by Permittee under this Permit, and all contracts covering the transmission of electric energy by means of said facilities, or any part thereof, and shall retain possession, management and control thereof for such length of time as may appear to the President to be necessary to accomplish said purpose and then restore possession and control to Permittee; and in the event that the United States shall exercise such right, it shall pay to Permittee just and fair compensation for the use of said facilities as may be fixed by the Commission upon the basis of a reasonable profit in time

of peace, and the cost of restoring said facilities to as good condition as existed at the taking over thereof, less the reasonable value of any improvements that may be made thereto by the United States and which are valuable and serviceable to Permittee.

IN WITNESS WHEREOF, I, John N. Nassikas , have hereunto signed my name this 21st day of August, 1970, in the City of Washington, District of Columbia.

John N. Nassikas
Chairman of the
Federal Power Commission

Executive Order No. 10485, September 3, 1953, 3 C.F.R., 1949-53 Comp., 970, provides in pertinent part:

EXECUTIVE ORDER 10485

PROVIDING FOR THE PERFORMANCE OF CERTAIN FUNCTIONS HERETOFORE PERFORMED BY THE PRESIDENT WITH RESPECT TO ELECTRIC POWER AND NATURAL GAS FACILITIES LOCATED ON THE BORDERS OF THE UNITED STATES

WHEREAS section 202 (e) of the Federal Power Act, as amended, 49 Stat. 847 (16 U. S. C. 824a (e)), requires any person desiring to transmit any electric energy from the United States to a foreign country to obtain an order of the Federal Power Commission authorizing it to do so; and

WHEREAS section 3 of the Natural Gas Act, 52 Stat. 822 (15 U. S. C. 717b), requires any person desiring to export any natural gas from the United States to a foreign country or to import any natural gas from a foreign country to the United States to obtain an order from the Federal Power Commission authorizing it to do so; and

WHEREAS the proper conduct of the foreign relations of the United States requires that executive permission be obtained for the construction and maintenance at the borders of the United States of facilities for the exportation or importation of electric energy and natural gas; and

WHEREAS it is desirable to provide a systematic method in connection with the issuance and signing of permits for such purposes:

NOW, THEREFORE, by virtue of the authority vested in me as President of the United States and Commander in Chief of the armed forces of the United States, it is hereby ordered as follows:

SECTION 1. (a) The Federal Power Commission is hereby designated and empowered to perform the following-described functions:

(1) To receive all applications for permits for the construction, operation, maintenance, or connection, at the borders of the United States, of facilities for the transmission of electric energy between the United States and a foreign country.

(2) To receive all applications for permits for the construction, operation, maintenance, or connection, at the borders of the United States, of facilities for the exportation or importation of natural gas to or from a foreign country.

(3) Upon finding the issuance of the permit to be consistent with the public interest, and, after obtaining the favorable recommendations of the Secretary of State and the Secretary of Defense thereon, to issue to the applicant, as appropriate, a permit for such construction, operation, maintenance, or connection. The Commission shall have the power to attach to the issuance of the permit and to the exercise of the rights granted thereunder such conditions as the public interest may in its judgment require.

(b) In any case wherein the Federal Power Commission, the Secretary of State, and the Secretary of Defense cannot agree as to whether or not a permit should be issued, the Commission shall submit to the President for approval or disapproval the application for a permit with the respective views of the Commission, the Secretary of State and the Secretary of Defense.

SEC. 2. The Chairman or Acting Chairman of the Federal Power Commission is hereby designated and empowered to sign any permits issued by the Federal Power Commission pursuant to section 1 (a) (3) hereof.

SEC. 3. The Federal Power Commission is authorized to issue such rules and regulations, and to prescribe such procedures, as it may from time to time deem necessary or desirable for the exercise of the authority delegated to it by this order.

SEC. 4. All Presidential Permits heretofore issued pursuant to Executive Order No. 8202 [1] of July 13, 1939, and in force at the time of the issuance of this order, and all permits issued hereunder, shall remain in full force and effect until modified or revoked by the President or by the Federal Power Commission.

SEC. 5. Executive Order No. 8202 of July 13, 1939, is hereby revoked.

DWIGHT D. EISENHOWER

THE WHITE HOUSE,
September 3, 1953.

The Regulations under the Federal Power Act, 18 C.F.R., Subchapter B, Part 32, provide in pertinent part:

Section 32.50

APPLICATION FOR CONSTRUCTION, OPERATION, MAINTENANCE, OR CONNECTION AT INTERNATIONAL BOUNDARY, OF FACILITIES FOR TRANSMISSION OF ELECTRIC ENERGY

§ 32.50 Who shall apply.

(a) Any person, firm, or corporation contemplating the construction of, or who is operating or maintaining facilities at the borders of the United States, for the transmission of electric energy between the United States and a foreign country, shall file with the Commission an original and eight conformed copies of an application for a Presidential permit, in compliance with Executive Order No. 10485, dated September 3, 1953 (3 CFR, 1949–53 Comp., p. 970).

NOTE: Executive Order No. 8202 was revoked and superseded by Executive Order No. 10485, Sept. 3, 1953, 18 F.R. 5397, 3 CFR, 1949—1953 Comp., p. 970.

(b) In connection with applications hereunder, attention is directed to the provisions of §§ 32.30 to 32.38, relative to applications for authorization to transmit electric energy from the United States to a foreign country under section 202(e) of the Federal Power Act.

[Order 141, 12 F.R. 8494, Dec. 19, 1947, as amended by Order 342, 32 F.R. 6622, Apr. 29, 1967]

§ 32.51 Contents of application; filing fee.

Every application shall be accompanied by the fee prescribed in Part 36 of this subchapter and shall set forth in the order indicated, the following:

(a) Information regarding applicant:

(1) The exact legal name of applicant;

(2) The name, title, and post office address of the person to whom correspondence in regard to the application shall be addressed;

(3) If applicant is a corporation: Copy of articles of incorporation and by-laws; the amount and classes of capital stock; nationality of officers, directors and stockholders and the amount and class of stock held by each;

(4) Is applicant company, or its transmission lines, owned wholly or in part by any foreign government or directly, or indirectly subventioned by any foreign government; or, has applicant company any understanding for such ownership by or subvention from any foreign government? If so, give full details;

(b) A general or key map on a scale not greater than 20 miles to the inch, showing the physical location and giving a full description of the facilities employed, or to be employed in the transmission of electric energy between the United States and a foreign country. The map should indicate with particularity the ownership of the facilities at or on each side of the border between United States and the foreign country.

(c) Statement describing every existing contract that applicant has with a foreign government, or private concerns, which in any way relate to the control or fixing of rates for the purchase, sale or transmission of electric energy and which may serve in any way to restrict or prevent competing American companies from extending their activities; also, attach certified copies of such contracts;

(d) Copies of every landing license, or permit, which has been granted applicant, or any predecessor, by a foreign government or by any of its agencies, in connection with the transmission of electric energy between the United States and a foreign country.

[Order 141, 12 F.R. 8494, Dec. 19, 1947, as amended by Order 427, 36 F.R. 5596, Mar. 25, 1971]

§ 32.52 Other information.

The applicant shall furnish such additional information, in connection with the application, as the Commission may deem pertinent.

The Energy Supply and Environmental Coordination Act of 1974, P.L. 93-313, 88 Stat. 246, provides in pertinent part:

15 USC 793.

SEC. 7. PROTECTION OF PUBLIC HEALTH AND ENVIRONMENT.

87 Stat. 627.
15 USC 751 note.

(a) Any allocation program provided for in section 2 of this Act or in the Emergency Petroleum Allocation Act of 1973, shall, to the maximum extent practicable, include measures to assure that available low sulfur fuel will be distributed on a priority basis to those areas of the United States designated by the Administrator of the Environmental Protection Agency as requiring low sulfur fuel to avoid or minimize adverse impact on public health.

Study.

Ante, p. 248.

(b) In order to determine the health effects of emissions of sulfur oxides to the air resulting from any conversions to burning coal to which section 119 of the Clean Air Act applies, the Department of Health, Education, and Welfare shall, through the National Institute of Environmental Health Sciences and in cooperation with the Environmental Protection Agency, conduct a study of chronic effects among exposed populations. The sum of $3,500,000 is authorized to be appropriated for such a study. In order to assure that long-term studies can be conducted without interruption, such sums as are appropriated shall be available until expended.

Appropriation.

81 Stat. 485.
42 USC 1857.

42 USC 4321 note.

(c)(1) No action taken under the Clean Air Act shall be deemed a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969 (83 Stat. 856).

(2) No action under section 2 of this Act for a period of one year after initiation of such action shall be deemed a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969. However, before any action under section 2 of this Act that has a significant impact on the environment is taken, if practicable, or in any event within sixty days after such action is taken, an environmental evaluation with analysis equivalent to that required under section 102(2)(C) of the National Environmental Policy Act, to the greatest extent practicable within this time constraint, shall be prepared and circulated to appropriate Federal State, and local government agencies and to the public for a thirty-day comment period after which a public hearing shall be held upon request to review outstanding environmental issues. Such an evaluation shall not be required where the action in question has been preceded by compliance with the National Environmental Policy Act by the appropriate Federal agency. Any action taken under section 2 of this Act which will be in effect for more than a one-year period or any action to extend an action taken under section 2 of this Act to a total period of more than one year shall be subject to the full provisions of the National Environmental Policy Act, notwithstanding any other provision of this Act.

83 Stat. 852.

Environment evaluation, availability.
83 Stat. 853.
42 USC 4332.

Hearing.

Hydroelectric energy facilities, construction.

(d) In order to expedite the prompt construction of facilities for the importation of hydroelectric energy thereby helping to reduce the shortage of petroleum products in the United States, the Federal Power Commission is hereby authorized and directed to issue a Presidential permit pursuant to Executive Order 10485 of September 3, 1953, for the construction, operation, maintenance, and connection of facilities for the transmission of electric energy at the borders of the United States without preparing an environmental impact statement pursuant to section 102 of the National Environmental Policy Act of 1969 (83 Stat. 856) for facilities for the transmission of electric energy between Canada and the United States in the vicinity of Fort Covington, New York.

16 USC 824a note.

42 USC 4332.

Section 3 of the Federal Power Act, 16 U.S.C. §796, provides as follows:

SEC. 3. [*As amended August 26, 1935.*] The words defined in this section shall have the following meanings for purposes of this Act, to wit:

(1) "public lands" means such lands and interest in lands owned by the United States as are subject to private appropriation and disposal under public land laws. It shall not include "reservations," as hereinafter defined; [41 Stat. 1063; 49 Stat. 838; 16 U.S.C. 796(1)]

"Reservations." (2) "reservations" means national forest, tribal lands embraced within Indian reservations, military reservations, and other lands and interests in lands owned by the United States, and withdrawn, reserved, or withheld from private appropriation and disposal under the public land laws; also lands and interests in lands acquired and held for any public purposes; but shall not include national monuments or national parks; [41 Stat. 1063–1064; 49 Stat. 838; 16 U.S.C. 796(2)]

"Corporation." (3) "corporation" means any corporation, joint-stock company, partnership, association, business trust, organized group of persons, whether incorporated or not, or a receiver or receivers, trustee or trustees of any of the foregoing. It shall not include "municipalities" as hereinafter defined; [41 Stat. 1064; 49 Stat. 838; 16 U.S.C. 796(3)]

"Person." (4) "person" means an individual or a corporation; [49 Stat. 838; 16 U.S.C. 796(4)]

"Licensee." (5) "licensee" means any person, State, or municipality licensed under the provisions of section 4 of this Act, and any assignee or successor in interest thereof; [49 Stat. 838; 16 U.S.C. 796(5)]

"State." (6) "State" means a State admitted to the Union, the District of Columbia, and any organized Territory of the United States; [41 Stat. 1064; 49 Stat. 838; 16 U.S.C. 796(6)]

"Municipality." (7) "municipality" means a city, county, irrigation district, drainage district, or other political subdivision or agency of a State competent under the laws thereof to carry on the business of developing, transmitting, utilizing, or distributing power; [41 Stat. 1064; 49 Stat. 838; U.S.C. 796(7)]

"Navigable waters."

(8) "navigable waters" means those parts of streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States, and which either in their natural or improved condition notwithstanding interruptions between the navigable parts of such streams or waters by falls, shallows, or rapids compelling land carriage, are used or suitable for use for the transportation of persons or property in interstate or foreign commerce, including therein all such interrupting falls, shallows, or rapids, together with such other parts of streams as shall have been authorized by Congress for improvement by the United States or shall have been recommended to Congress for such improvement after investigation under its authority; [41 Stat. 1064; 49 Stat. 838; 16 U.S.C. 796(8)]

"Municipal purposes."

(9) "municipal purposes" means and includes all purposes within municipal powers as defined by the constitution or laws of the State or by the charter of the municipality; [41 Stat. 1064; 49 Stat. 838; 16 U.S.C. 796(9)]

"Government dam."

(10) "Government dam" means a dam or other work constructed or owned by the United States for Government purposes with or without contribution from others; [41 Stat. 1064; 49 Stat. 838; 16 U.S.C. 796(10)]

"Project."

(11) "project" means complete unit of improvement or development, consisting of a power house, all water conduits, all dams and appurtenant works and structures (including navigation structures) which are a part of said unit, and all storage, diverting, or forebay reservoirs directly connected therewith, the primary line or lines transmitting power therefrom to the point of junction with the distribution system or with the interconnected primary transmission system, all miscellaneous structures used and useful in connection with said unit or any part thereof, and all water-rights, rights-of-way, ditches, dams, reservoirs, lands, or interest in lands the use and occupancy of which are necessary or appropriate in the maintenance and operation of such unit; [41 Stat. 1064; 49 Stat. 838–839; 16 U.S.C. 796(11)]

"Project works."

(12)"project works" means the physical structures of a project; [41 Stat. 1064; 49 Stat. 839; 16 U.S.C. 796(12)]

"Net investment."

(13) "net investment" in a project means the actual legitimate original cost thereof as defined and interpreted in the "classification of investment in road and equipment of steam roads, issue of 1914, Interstate Commerce Commission," plus similar cost of additions thereto and betterments thereof, minus the sum of the following items properly allocated thereto, if and to the extent that such items have been accumulated during the period of the license from earnings in excess of a fair return on such investment: (a) Unappropriated surplus, (b) aggregate credit balances of current depreciation accounts, and (c) aggregate appropriations of surplus or income held in amortization, sinking fund, or similar reserves, or expended for additions or betterments or used for the purposes for which such reserves were created. The term "cost" shall include, insofar as applicable, the elements thereof prescribed in said classification, but shall not include expenditures from funds obtained through donations by States, municipalities, individuals, or others, and said classification of investment of the Interstate Commerce Commission shall insofar as applicable be published and promulgated as a part of the rules and regulations of the Commission; [41 Stat. 1064–1065; 49 Stat. 839; 16 U.S.C. 796(13)]

"Cost."

Items excluded.

"Commission."

"Commissioner."

(14) "Commission" and "Commissioner" means the Federal Power Commission, and a member thereof, respectively; [49 Stat. 839; 16 U.S.C. 796(14)]

"State commission."

(15) "State commission" means the regulatory body of the State or municipality having jurisdiction to regulate rates and charges for the sale of electric energy to consumers within the State or municipality; [49 Stat. 839; 16 U.S.C. 796(15)]

"Security."

(16) "security" means any note, stock, treasury stock, bond, debenture, or other evidence of interest in or indebtedness of a corporation subject to the provisions of this Act. [49 Stat. 839; 16 U.S.C. 796(16)]

SEC. 4. [*As amended August 26, 1935.*] The Commission is hereby authorized and empowered—

(a) To make investigations and to collect and record data concerning the utilization of the water resources of any region to be developed, the water-power industry and its relation to other industries and to interstate or foreign commerce, and concerning the location, capacity, development costs, and relation to markets of power sites, and whether the power from Government dams can be advantageously used by the United States for its public purposes, and what is a fair value of such power, to the extent the Commission may deem necessary or useful for the purposes of this Act. [41 Stat. 1065; 49 Stat. 839; 16 U.S.C. 797(a)]

(b) To determine the actual legitimate original cost of and the net investment in a licensed project, and to aid the Commission in such determinations, each licensee[7] shall, upon oath, within a reasonable period of time to be fixed by the Commission, after the construction of the original project or any addition thereto or betterment thereof, file with the Commission in such detail as the Commission may require, a statement in duplicate showing the actual legitimate original cost of construction of such project, addition, or betterment, and of the price paid for water rights, rights-of-way, lands, or interest in lands. The licensee shall grant to the Commission or to its duly authorized agent or agents, at all reasonable times, free access to such project, addition, or betterment, and to all maps, profiles, contracts, reports of engineers, accounts, books, records, and all other papers and documents relating thereto. The statement of actual legitimate original cost of said project, and revisions thereof as determined by the Commission, shall be filed with the Secretary of the Treasury. [41 Stat. 1065; 49 Stat. 839–840; 16 U.S.C. 797(b)]

(c) To cooperate with the executive departments and other agencies of State or National Governments in such investigations; and for such purpose the several departments and agencies of the National Government are authorized and directed upon the request of the Commission to furnish such records, papers, and information in their possession as may be requested by the Commission, and temporarily to detail to the Commission such officers or experts as may be necessary in such investigations. [41 Stat. 1065; 49 Stat. 840; 16 U.S.C. 797(c)]

(d) To make public from time to time the information secured hereunder and to provide for the publication of its reports and investigations in such form and manner as may be best adapted for public information and use. The Commission, on or before the 3d day of January of each year, shall submit to Congress for the fiscal year preceding a classified report showing the permits and licenses issued under this Part, and in each case the parties thereto, the terms prescribed, and the moneys received if any, on account thereof. Such report shall contain the names and show the compensation of the persons employed by the Commission. [41 Stat. 1065; 46 Stat. 798; 49 Stat. 840; 16 U.S.C. 797(d)]

(e) To issue licenses to citizens of the United States, or to any association of such citizens, or to any corporation organized under the laws of the United States or any State thereof, or to any State or municipality for the purpose of constructing, operating, and maintaining dams, water conduits, reservoirs, power houses, transmission lines, or other project works necessary or convenient for the development and improvement of navigation and for the development, transmission, and utilization of power across, along, from or in any of the streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States, or upon any part of the public lands and reservations of the United States (including the Territories), or for the purpose of utilizing the surplus water or water power from any Government dam, except as herein provided: *Provided*, That licenses shall be issued within any reservation only after a finding by the Commission that the license will not interfere or be inconsistent with the purpose for which such reservation was created or acquired, and shall be subject to and contain such conditions as the Secretary of the department under whose supervision such reservation falls shall deem necessary for the adequate protection and utilization of such reservation.[8] *Provided further*, That no license affecting the navigable capacity of any navigable waters of the United States shall be issued until the plans of the dam or other structures affect-

ing navigation have been approved by the Chief of Engineers and the Secretary of the Army.[9] Whenever the contemplated improvement is, in the judgment of the Commission, desirable and justified in the public interest for the purpose of improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, a finding to that effect shall be made by the Commission and shall become a part of the records of the Commission: *Provided further*, That in case the Commission shall find that any Government dam may be advantageously used by the United States for public purposes in addition to navigation, no license therefor shall be issued until two years after it shall have reported to Congress the facts and conditions relating thereto, except that this provision shall not apply to any Government dam constructed prior to June 10, 1920: *And provided further*, That upon the filing of any application for a license which has not been preceded by a preliminary permit under subsection (f) of this section, notice shall be given and published as required by the proviso of said subsection. [41 Stat. 1065–1066; 49 Stat. 840–841; 61 Stat. 501; 16 U.S.C. 797(e)]

(f) To issue preliminary permits for the purpose of enabling applicants for a license hereunder to secure the data and to perform the acts required by section 9 hereof: *Provided*, *however*, That upon the filing of any application for a preliminary permit by any person, association, or corporation the Commission, before granting such application, shall at once give notice of such application in writing to any State or municipality likely to be interested in or affected by such application; and shall also publish notice of such application once each week for four weeks in a daily or weekly newspaper published in the county or counties in which the project or any part thereof or the lands affected thereby are situated. [41 Stat. 1066; 49 Stat. 841; 16 U.S.C. 797(f)]

(g) Upon its own motion to order an investigation of any occupancy of, or evidenced intention to occupy, for the purpose of developing electric power, public

Section 10 of the Federal Power Act, 16 U.S.C. §803, provides as follows:

Conditions of licenses.

SEC. 10. [*As Amended August 26, 1935, September 7, 1962, and August 3, 1968.*] All licenses issued under this Part shall be on the following conditions:

Project adapted to utilize navigation, water power, etc.

(a) That the project adopted, including the maps, plans, and specifications, shall be such as in the judgment of the Commission will be best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of waterpower development, and for other beneficial public uses, including recreational purposes; and if necessary in order to secure such plan the Commission shall have authority to require the modification of any project and of the plans and specifications of the project works before approval. [41 Stat. 1068; 49 Stat. 842; 16 U.S.C. 803(a)]

Restriction on alterations.

(b) That except when emergency shall require for the protection of navigation, life, health, or property, no substantial alteration or addition not in conformity with the approved plans shall be made to any dam or other project works constructed hereunder of an installed capacity in excess of two thousand [10] horsepower without the prior approval of the Commission; and any emergency alteration or addition so made shall thereafter be subject to such modification and change as the Commission may direct. [41 Stat. 1068–1069; 49 Stat. 842; 16 U.S.C. 803(b)]

Project works to be maintained in effective operation, etc.

(c) That the licensee shall maintain the project works in a condition of repair adequate for the purposes of navigation and for the efficient operation of said works in the development and transmission of power, shall make all necessary renewals and replacements, shall establish and maintain adequate depreciation reserves for such purposes, shall so maintain and operate said works as not to impair navigation, and shall conform to such rules and regulations as the Commission may from time to time prescribe for the protection of life, health, and property. Each licensee hereunder shall be liable for all damages occasioned to the property of others by the construction, maintenance, or operation of the project works or of the works appurtenant or accessory thereto, constructed under the license, and in no event shall the United States be liable therefor. [41 Stat. 1069; 49 Stat. 842; 16 U.S.C. 803(c)]

Liability for damages to property of others.

[10] Amended by Act of September 7, 1962, 76 Stat. 447.

Section 202 of the Federal Power Act, 16 U.S.C. §824a, provides as follows:

INTERCONNECTION AND COORDINATION OF FACILITIES; EMERGENCIES; TRANSMISSION TO FOREIGN COUNTRIES

Interconnection and coordination of facilities.

SEC. 202. [*As amended August 7, 1953.*] (a) For the purpose of assuring an abundant supply of electric energy throughout the United States with the greatest possible economy and with regard to the proper utilization and conservation of natural resources, the Commission is empowered and directed to divide the country into regional districts for the voluntary interconnection and coordination of facilities for the generation, transmission, and sale of electric energy, and it may at any time thereafter, upon its own motion or upon application, make such modifications thereof as in its judgment will promote the public interest. Each such district shall embrace an area which, in the judgment of the Commission, can economically be served by such interconnected and coordinated electric facilities. It shall be the duty of the Commission to promote and encourage such interconnection and coordination within each such district and between such districts. Before establishing any such district and fixing or modifying the boundaries thereof the Commission shall give notice to the State commission of each State situated wholly or in part within such district, and shall afford each such State commission reasonable opportunity to present its views and recommendations, and shall receive and consider such views and recommendations. [49 Stat. 848; 16 U.S.C. 824a(a)]

Conservation of natural resources.

Regional districts.

Voluntary interconnection and coordination of facilities.

Commission to cooperate with States in establishing regional districts.

Hearings upon application for interconnection of facilities.

(b) Whenever the Commission, upon application of any State commission or of any person engaged in the transmission or sale of electric energy, and after notice to each State commission and public utility affected and after opportunity for hearing, finds such action necessary or appropriate in the public interest it may by order direct a public utility (if the Commission finds that no undue burden will be placed upon such public utility thereby) to establish physical connection of its transmission facilities with the facilities of one or more other persons engaged in the transmission or sale of electric energy, to sell energy to or exchange energy with such persons: *Provided*, That the Commission shall have no authority to compel the enlargement of generating facilities for such purposes, nor to compel such public utility to sell or exchange energy when to do so would impair its ability to render adequate service to its customers. The Commission may prescribe the terms and conditions of the arrangement to be made between the persons affected by any such order, including the apportionment of cost between them and the compensation or reimbursement reasonably due to any of them. [49 Stat. 848–849; 16 U.S.C. 824a(b)]

Commission may order interconnection.

Proviso.—Commission cannot compel enlargement of generating facilities.

Commission may prescribe terms and conditions of arrangements for interconnection and apportion cost thereof.

Temporary interconnection during national emergency.

(c) During the continuance of any war in which the United States is engaged, or whenever the Commission determines that an emergency exists by reason of a sudden increase in the demand for electric energy, or a shortage of electric energy or of facilities for the generation or transmission of electric energy, or of fuel or water for generating facilities, or other causes, the Commission shall have authority, either upon its own motion or upon complaint, with or without notice, hearing, or report, to require by order such temporary connections of facilities and such generation, delivery, interchange, or transmission of electric energy as in its judgment will best meet the emergency and serve the public interest. If the parties affected by such order fail to agree upon the terms of any arrangement between them in carrying out such order, the Commission, after hearing held either before or after such order takes effect, may prescribe by supplemental order such terms as it finds to be just and reasonable, including the compensation or reimbursement which should be paid to or by any such party. [49 Stat. 849; 16 U.S.C. 824a(c)]

Notice and hearing not required.

Terms for interconnection may be prescribed by Commission.

(d) During the continuance of any emergency requiring immediate action, any person engaged in the transmission or sale of electric energy and not otherwise subject to the jurisdiction of the Commission may make such temporary connections with any public utility subject to the jurisdiction of the Commission or may construct such temporary facilities for the transmission of electric energy in interstate commerce as may be necessary or appropriate to meet such emergency, and shall not become subject to the jurisdiction of the Commission by reason of such temporary connection or temporary construction: *Provided*, That such temporary connection shall be discontinued or such temporary construction removed or otherwise disposed of upon the termination of such emergency: *Provided further*, That upon approval of the Commission permanent connections for emergency use only may be made hereunder. [49 Stat. 849; 16 U.S.C. 824a(d)]

Temporary emergency connection of facilities not subject to Commission jurisdiction.

Proviso.—Temporary interconnections to be terminated at end of emergency.

Proviso.—Permanent emergency connection authorized.

(e) After six months from the date on which this Part takes effect, no person shall transmit any electric energy from the United States to a foreign country without first having secured an order of the Commission authorizing it to do so. The Commission shall issue such order upon application unless, after opportunity for hearing, it finds that the proposed transmission would impair the sufficiency of electric supply within the United States or would impede or tend to impede the coordination in the public interest of facilities subject to the jurisdiction of the Commission. The Commission may by its order grant such application in whole or in part, with such modifications and upon such terms and conditions as the Commission may find necessary or appropriate, and may from time to time, after opportunity for hearing and for good cause shown, make such supplemental orders in the premises as it may find necessary or appropriate. [49 Stat. 849; 16 U.S.C. 824a(e)]

Exportation of energy prohibited.

Commission may authorize exportation upon application.

Hearing.

Terms and conditions for exportation.

Electric energy, transmission or sale.

(f) The ownership or operation of facilities for the transmission or sale at wholesale of electric energy which is (a) generated within a State and transmitted from that State across an international boundary and not thereafter transmitted into any other State, or (b) generated in a foreign country and transmitted across an international boundary into a State and not thereafter transmitted into any other State, shall not make a person a public utility subject to regulation as such under other provisions of this part. The State within which any such facilities are located may regulate any such transaction insofar as such State regulation does not conflict with the exercise of the Commission's powers under or relating to subsection 202 (e). [67 Stat. 461; 16 U.S.C. 824a(f)]

Section 303 of the Federal Power Act, 16 U.S.C. §825(b), provides in pertinent part:

REQUIREMENTS APPLICABLE TO AGENCIES OF THE UNITED STATES

Agencies of United States subject to provisions relative to accounts, records, etc.

SEC. 303. All agencies of the United States engaged in the generation and sale of electric energy for ultimate distribution to the public shall be subject, as to all facilities used for such generation and sale, and as to the electric energy sold by such agency, to the provisions of sections 301 and 302 hereof, so far as may be practicable, and shall comply with the provisions of such sections and with the rules and regulations of the Commission thereunder to the same extent as may be required in the case of a public utility. [49 Stat. 885; 16 U.S.C. 825b]

Section 313 of the Federal Power Act, 16 U.S.C. §8251, provides as follows:

REHEARINGS; COURT REVIEW OF ORDERS

SEC. 313. (a) Any person, State, municipality, or State commission aggrieved by an order issued by the Commission in a proceeding under this Act to which such person, State, municipality, or State commission is a party may apply for a rehearing within thirty days after the issuance of such order. The application for rehearing shall set forth specifically the ground or grounds upon which such application is based. Upon such application the Commission shall have power to grant or deny rehearing or to abrogate or modify its order without further hearing. Unless the Commission acts upon the application for rehearing within thirty days after it is filed, such application may be deemed to have been denied. No proceeding to review any orders of the Commission shall be brought by any person unless such person shall have made application to the Commission for a rehearing thereon. Until the record in a proceeding shall have been filed in a court of appeals, as provided in subsection (b), the Commision may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it under the provisions of this act.[19]

(b) Any party to a proceeding under this Act aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the Circuit Court of Appeals of the United States [20] for any circuit wherein the licensee or public utility to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of title 28,

United States Code.[20a] Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part.[19] No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of additional evidence so taken, and it shall file with the court such modified or new findings which, if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U.S.C., title 28, secs. 346 and 347).[21]

(c) The filing of an application for rehearing under subsection (a) shall not, unless specifically ordered by the Commission, operate as a stay of the Commission's order. The commencement of proceedings under subsection (b) of this section shall not, unless specifically ordered by the court, operate as a stay of the Commission's order. [49 Stat. 860; 16 U.S.C. 825*l*]

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Greene County Planning Board, Petitioner,	)	
v.	)	No. 74-2638
Federal Power Commission, Respondent,	)	
Power Authority of the State of New York, Intervenor.	)	

CERTIFICATE OF SERVICE

I hereby certify that I have this day served Respondent's brief in the above-referenced proceedings, by mailing copies to all counsel of record.

Respectfully submitted,

Philip R. Telleen

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Federal Power Commission
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May 20, 1975